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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 67, Original

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game, — *Plaintiffs,*

v.

STATE OF OREGON, STATE OF WASHINGTON, *Defendants.*

DEFENDANT STATE OF WASHINGTON'S RESPONSE TO PLAINTIFF'S EXCEPTIONS

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I.

INTRODUCTION

The plaintiff State of Idaho asserts that it is seeking by this action to protect the "diminishing runs of spring Chinook salmon, summer Chinook salmon, and summer steelhead"

(Idaho Br. 5/1/79, p. 2) and to secure from this Court an "equitable" apportionment of the upriver anadromous fish runs in the Columbia River Basin. This Court has denied other relief sought by Idaho (429 U.S. 163) and appointed a Special Master for further proceedings (431 U.S. 952).

The Special Master's report and supplemental report of February 2, 1979, has concluded:

(1) "The question of whether a state may maintain an original action for the apportionment of a migratory fish run is one of first impression and should be decided after trial on the merits, not on the pleadings." (Rpt. 17)

(2) The United States is an indispensable party to these proceedings, and the case cannot proceed without joinder of the United States. (Rpt. 4)

II.

SUMMARY OF ARGUMENT

No party at any time prior to the plaintiff's brief of May 1, 1979,

disputed the assumption that the United States, by virtue of its sovereign immunity, cannot be joined in this action without its consent. Further, prior to that brief, Idaho did not contend that the United States either consented or waived its immunity for this proceeding.

This Court as recently as February 22, 1979, observed in California v. Arizona, 59 L. ed 2d. 144:

> "'It does not follow that because the state may be sued by the United States without its consent, therefore the United States may be sued by a state without its consent. Public policy forbids that conclusion.' Kansas v. United States, 204 U.S. 331, 342. (Supra at 148)
>
> "Thus, if the United States has not consented to be sued in an action such as this [original action between states] California's motion for leave to file a complaint must be denied." (Supra at 149)

Those statements by this Court were made with the express recognition that if this court did not hear

the dispute between California and Arizona, then the suit could not be maintained in any court.

The plaintiff vigorously disputes the decision consciously made by the United States not to waive its immunity and join this litigation. But the plaintiff avoids what should have been a major consideration by the United States not to encourage the continuation of this litigation. That is the impact of the United States Corps of Engineers' dams on the Columbia and Snake Rivers upon the fishery resource:

> "Well-intentioned, legitimately concerned, but poorly informed Idaho sports fishermen, for example, today commonly blame non-Indian and Indian gillnetters for the endangered condition of Snake River Summer Chinook. Yet these fish have had almost total protection from the gillnet fishery since 1965.
>
> "Many, perhaps most Idaho salmon and steelhead sports fishermen are not aware or do not believe main

> stem Columbia and Snake River dams are predominantly responsible for virtually eliminating salmon and steelhead fishing in Idaho." (Exhibit W-3, p. 26)

Yet this suit is directed against the States of Washington and Oregon which did not authorize, construct or operate those eight United States Corps of Engineers' dams which have and continue to have a severe impact upon the fish resource.

Idaho has expressed concern with reference to three species of fish: Upriver spring Chinook, summer Chinook, and summer steelhead. With reference to those species the Special Master found:

(1) That since 1964 there has not been a commercial harvest of upriver summer Chinook in the Columbia River and from 1964-76 not even a sports fishery. (Rpt. 10) Although not part of the record, no commerical season for summer Chinook was permitted in 1977 or 1978, and none is planned for 1979. The only sports

harvest of summer Chinook since 1977 has been of immature "jacks" not mature fish.

(2) From 1967-1973 the commercial harvest for upriver spring Chinook was limited to eleven days, with a one-day season in 1974, none in 1975 or 1976, (Rpt. 10) and during the period 1977 to 1979 there has been a total of seven days for such harvests.

(3) The commerical harvest of steelhead has been limited for some time, with the exception of Indian harvests, and in 1975-76 even the recreational harvest was closed. (Rpt. 10) The recreational or sports harvest in the lower portion of the Columbia River normally reflects the harvest of only 7,000 summer steelhead on a run size of approximately 150,000. (Tr. 133)

What further restrictions can Idaho desire?

While the non-Indian fishery which is subject to regulation by Oregon and Washington in the Columbia River has been prohibited or sub-

stantially restricted, the Master noted and recognized:

> "The Indian catch of salmon and steelhead increased from a low of 39,700 pounds in 1959 to a high of nearly 3,000,000 pounds in 1975 and 1976." (Rpt. 10)

It is in that context that the Special Master has found that the United States is an indispensable party not only as trustee for four Indian tribes which have treaty protected fishing rights in the Columbia River, but also by virtue of its construction and operation of facilities which affect both the upstream and downstream passage of fish. (Rpt. 4)

III.

ARGUMENT

I. INTRODUCTION

Briefs previously filed with the Special Master and this Court have extensively discussed both the factual and legal basis for concluding that the United States is an indispensable party in the present proceedings. We

are referring to the Brief of the defendant State of Washington on the Indispensability of the United States (February 24, 1978); the Brief of the State of Oregon on Affirmative Defenses, and the Memorandum by the United States as Amicus Curiae, April 6, 1978, and April, 1979. Also, the Report and Supplemental Report of the Special Master, February 2, 1979, clearly and succinctly indicates the factual and legal basis for concluding that the United States is an indispensable party. In light of those briefs and the Master's Report, we will here limit our comments.

Before proceeding, we should note that the State of Washington has presented arguments both to this Court and to the Special Master that Idaho's complaint fails to state a claim upon which relief can be granted. While we believe that our contention is correct, we have difficulty faulting the Special Master's conclusion that since the question presented is one of first impression, it is appropriate not to decide the matter on the basis of the

pleadings.

If this litigation continues, the nature and extent, if any, of the right asserted by Idaho will have to be determined on the basis of an appropriate record. We must emphasize that there is a fundamental difference between water right adjudications between states and the requested relief here relating to migratory fish. In water law, within each state water rights are in the nature of a property interest, whether based on a riparian or an appropriation theory. The holder of water rights has the right to use the quantity of water reflected by the right in accordance with his priority in reference to other holders of water rights. Thus, water right adjudications between states are the means by which property interests within states are harmonized and coordinated with water rights in an adjoining state. In contrast, with reference to wild animals and fish there are no holders of property rights in the wildlife. As this Court recently observed in Hughes v.

Oklahoma, 47 LW 4447, 4451 (April 24, 1979) quoting from Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1965):

> "A state does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds or animals."

In the absence of individually held rights, as exist in water law, it is neither necessary or appropriate to create a federal common law of wildlife comprable to water law since there are no property rights which require harmonization and coordination between adjoining states.

2. INDISPENSABILITY OF THE UNITED STATES

Snake River rises in Wyoming, flows across Idaho, and forms the boundary between Idaho and Oregon for approximately one hundred and sixty-five miles. The Snake River then forms the boundary between Idaho and Washington for approximately thirty miles, enters Washington and flows nearly one hundred miles to its confluence with the Columbia River. Approximately twenty miles below the conflux of the Snake

and the Columbia, the Columbia River forms the boundary between Oregon and Washington for two hundred and seventy miles ending where the Columbia River flows into the Pacific Ocean.

The major attention in this proceeding has been directed to the Snake and Columbia Rivers from the Idaho-Washington border to the Pacific Ocean, but it must be emphasized that the spawning and rearing of anadromous fish occur in other portions of the Columbia River Basin. (See Exhibit W-1, Map, p. 3) Those fish are at times in the Lower Columbia River mixed with Snake River fish and thus there may not be "a definite point that you can establish effective harvest splits on separating the two groups of fish." (Tr. 180)

Fish attempting to migrate from Idaho to the Pacific Ocean must successfully pass eight dams constructed and operated by the United States Corps of Engineers. These dams are listed in the sequence that the fish encounter them in their downstream migration.

(The date in parenthesis reflects the date of construction.)

Lower Granite (1975)
Little Goose (1970)
Lower Monumental (1969)
Ice Harbor (1961)
McNary (1953)
John Day (1968)
The Dalles (1957)
Bonneville (1938)

The United States Corps of Engineers, United States Bureau of Reclamation and the Federal Energy Regulatory Commission exercise control over the release of water from dams in the Columbia Basin. "Without provision for spill water, the migrating smolts must pass through the turbines with resulting high mortalities." (Rpt. 8) In 1973, a low water flow year in the Columbia River, more than 95 percent of Snake River juvenile salmon and steelhead migrating during low flow were killed before reaching the Columbia River below Bonneville Dam. (Exhibit W-3, p. 6 and Tr. 116) The survival of downstream Chinook juveniles to The Dalles Dam, which is the next to last dam encountered by downstream

migrants, varied from 55 to 65 percent during 1965-69, but dropped to 24 percent in 1970; 15 percent in 1972; and 5 percent in 1973. (Exhibit W-4, p. 5) A similar pattern of mortalities existed for steelhead juveniles. In addition to the fish mortality presented by each dam, a reduction in stream flow by the dams impounding water causes some fish to become disoriented in slack water and lose the urge to migrate to the ocean. (Tr. 243 and Exhibit W-4, p. A-15)

Those anadromous fish which successfully migrate to the Pacific Ocean reside there until they die, are caught, or achieve maturity and commence their return migration to their place of origin. While the anadromous fish are highly mobile in the ocean, a substantial portion of the fishery harvest is subject to the jurisdiction of the United States government under the Fishery and Conservation and Management Act of 1976. (16 U.S.C. 1801)

Adult fish seeking to return to Idaho encounter the eight United States dams. While each dam has fish ladders,

those ladders require monitoring and modification to be effective. Further, some fish ascending the ladders are lost by "fallback" resulting from disorientation after a downstream return over spillways. (Tr. 123) The loss of upstream migrants at each mainstem dam has been estimated at 15 percent. (Exhibit W-3, p. 6) (Rpt. 9)

The problem presented for fish passage by the construction and operation of these dams by the federal government is dramatically illustrated by comparing the escapement of summer Chinook passing Ice Harbor Dam, which is the first dam on the Snake River, to Bonneville which is the first dam on the Columbia River. The impact of the most recent three dams on the Snake River, Lower Monumental (1969), Little Goose (1970), and Lower Granite (1975), is dramatically illustrated by comparing the ratios for 1968 and 1969 with 1975 and 1976. These ratios reflect the percent of summer Chinook successfully passing the first dam on the Snake River (Ice Harbor) with

reference to those clearing Bonneville Dam.

1968 - 35.6%	1975 - 17.4%
1969 - 30.3%	1976 - 14.5%

The greatest single impact upon the return of fish to the Snake River in Idaho, other than natural weather conditions, is the United States' construction and operation of the dams on the River and the controls exercised on flows and spills. How can there be an adjudication and delivery of fish to Idaho without the joinder the major actor?

This Court held in Texas v. New Mexico, 352 U.S. 991 (1957) that the United States' responsibility to its Indian wards is an interest which makes the United States an indispensable party when such Indian interests are affected. On the Columbia River, there is a decree by the United States District Court for Oregon Sohappy v. Smith, 302 F. Sup. 899, 529 F. 2d 570, which has apportioned the Columbia River fishery between four treaty tribes and non-Indian fishermen. The Special

Master recognized that an apportionment of fish between Idaho and downstream fishermen would effect the Indian harvest.

> "Increased escapement at Bonneville will not assure than an increased number of fish will reach Idaho.[1] More fish will be available for Indian harvest and, in the absence of the United States and the tribes, no control may be exercised over the Indian harvest. The benefit to Idaho is uncertain, but the detriment to non-Indian commercial fishing below Bonneville is apparent. An adequate decree should recognize, assure, and protect all

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[1] In Washington v. Oregon, 297 U.S. 517 (1936), this Court recognized the phenomena of transportation loss and considered that loss in denying relief to Washington. In that situation, if the water was not diverted for use in the State of Oregon, then in all likelihood the water would be lost in the deep gravel channel of the river, and thus would not be available during the dry season for use in Washington. (Supra at 529) In the present situation, a substantial portion of fish clearing Bonneville Dam do not survive the upstream migration to Idaho.

> interrelated rights. It cannot do so unless all effected parties are bound." (Footnote added) (Rpt. 20)

Either the additional fish decreed for Idaho would be subject to the Indian fishery or the Indian fish entitlement would be decreased. If there is an increase in the Indian harvest, then the United States is indispensable to fashion appropriate relief so that Idaho would enjoy the benefits of a favorable decree or, conversely, if the Indian entitlement is to be redefined, then the United States in indispensable for the adjudication of such Indian rights. In either situation, the United States is indispensable. (See: Wash. Brief of February 24, 1978, p. 12, et seq.; Special Masters Report, p. 17, et seq.)

IV.

CONCLUSION

Idaho's most recent exceptions of May, 1979, have, like this brief,

not added any new considerations[2] not previously expressed in briefs filed with the Special Master and with this Court. Idaho's basic thesis is that whenever a "problem" is perceived to exist, a judicial remedy must be made available. Justice Aldisert of the 3rd Circuit Court of Appeals recently

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2 The possible exception being the contention that the United States does not enjoy sovereign immunity. However, as recently as February 22, 1979, this Court again recognized that the United States does have sovereign immunity in original actions between states. California v. Arizona, 59 L. ed 2d. 144. A law review article cited by the plaintiff, 20 Hastings L.S. 1 (1968) observed at p. 2, fn 4:

> "Thus, the United States may sue states in the original jurisdiction. Authorities cited Note 1, supra. The states, however, may not sue the United States without its consent. e.g. Louisiana v. McAdoo, 234 U.S. 627, 628-29 (1914); Kansas v. United States, 204 U.S. 331, 343 (1907); Oregon v. Hitchcock, 202 U.S. 60, 70 (1906)."

expressed some comments with reference to that thesis in his article in 38 University of Pittsburgh Law Review, 437 (1977) "The Role of the Courts in Contemporary Society", as follows:

> "While I cheerfully concede that many concrete disputes qualify as explosive societal issues, I believe a distinction can -and must-be drawn between a dispute, which belongs in a court, and a problem, which does not." (Supra 472)
>
> "The reality of legislative and administrative solutions to problems is that they may be tentative, experimental and susceptible to change. By contrast, judicial solutions, couched in terms of constitutional rule, 'move much more in the realm of the absolute.'" (Supra 473)

As the Special Master recognized in the instant proceeding, "the preservation and apportionment of the anadromous fishery of the Columbia River System present complex and interrelated environmental, social, economic, legal, political and

philosophical conflicts not solvable by judicial action." (Rpt. 24)

We respectfully submit that the Special Master's Report should be adopted by the Court and this action be dismissed.

DATED this 31st day of May, 1979.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 1979, three copies of Defendant State of Washington's Response to Plaintiff's Exceptions were mailed, postage paid, to:

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